



Redress and remedy

The BSWAT Payment Scheme is not the answer

Submission to Senate Standing Committee on Community Affairs

Inquiry into *Business Services Wage Assessment Tool Payment Scheme Bill 2014* and *Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014*

23 July 2014



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WHO WE ARE

The Australian Lawyers Alliance is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The Australian Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

We are represented in every state and territory in Australia. More information about us is available on our website.¹



INTRODUCTION

The Australian Lawyers Alliance ('ALA') welcomes the opportunity to provide a submission to the Senate Standing Committee on Community Affairs in its inquiry into the *Business Services Wage Assessment Tool Payment Scheme Bill 2014* and *Business Services Wage Assessment Tool Payment Scheme (Consequential Amendments) Bill 2014* ('the Bills').

We are concerned that the Bills will undermine individuals' access to an appropriate remedy for discrimination and severe underpayment of wages.

We note that the Bills appear to attempt to circumvent the key decision in the Full Court of the Federal Court of Australia, *Nojin v Commonwealth of Australia* [2012] FCAFC 192.

We also note that there will be large scale impact upon thousands of workers nationwide if these bills are introduced.

BACKGROUND

In the case of *Nojin v Commonwealth of Australia* [2012] FCAFC 192 the Plaintiffs, Mr Nojin and Mr Prior, both had a moderate intellectual disability and submitted that the Australian Disability Enterprises (ADEs) in which they worked discriminated against them in their employment, compared to other people living with disability who were not intellectually disabled, via the use of the Business Services Wage Assessment Tool (BSWAT) to assess their wages.

Mr Nojin has cerebral palsy, epilepsy and a moderate intellectual disability. Prior to the proceedings at first instance, he had worked in an ADE, Coffs Harbour Challenge, for close to 25 years. Following the introduction of the Business Services Wage Assessment Tool in 2004, he was paid between \$1.79 and \$2.46 per hour.

Mr Prior is classified as legally blind, although he has some vision and has a mild to moderate intellectual disability. Mr Prior worked in an ADE known as Stawell Intertwine Services Inc ("SIS"). Prior to the proceedings at first instance, Mr Prior had worked at SIS for about two years.

In 2012, the Full Court of the Federal Court found that requiring workers with intellectual disability to undergo the BSWAT assessment amounted to unlawful discrimination.



The Federal government attempted to appeal the decision in the High Court, but the High Court refused leave to appeal in May 2013.

Despite being refused leave to appeal, the Commonwealth did not appear to take steps to pay workers the balance of their unpaid wages.

Instead, on 5 September 2013, the Commonwealth applied to the Australian Human Rights Commission for an exemption from the *Disability Discrimination Act* 1992 (Cth) ('DDA'). The application sought a three year exemption under the DDA for the BSWAT.²

The Australian Human Rights Commission refused to grant a three year exemption.

However, on 29 April 2014, the Australian Human Rights Commission granted a temporary exemption from the operation of sections 15, 24 and 29 of the DDA to allow the payment of wages to ADE employees, based on assessments already conducted with the BSWAT, for a period of 12 months, subject to the following conditions:

'The Commonwealth:

- a. Take all necessary steps to transition to the Supported Wage System, or an alternative tool approved by the Fair Work Commission, as quickly as possible;
- b. Immediately commence using the Supported Wage System, or an alternative tool approved by the Fair Work Commission, to conduct new and outstanding wage assessments;
- c. Report to the Commission on a quarterly basis during the exemption period as to:
 - i. The number of assessments conducted each quarter; and
 - ii. The number of assessments still to be conducted.
- d. Give consideration to ensuring that no disadvantage is suffered by ADE employees whose wages may be reduced as a result of the application of the Supported Wage System or alternative tool.³

The Australian Human Rights Commission's decision was roundly criticised by peak disability groups, who described the decision as 'a missed opportunity to use the DDA to uphold the rights of people with intellectual disability'⁴. Peak groups also emphasised that the Supported Wage System (SWS) was the 'only legitimate assessment tool under Australia's industrial system'⁵.



On 4 October 2013, the Committee on the Rights of Persons with Disabilities for the United Nations Convention on the Rights of Persons with Disabilities recommended that Australia:

- (a) Immediately discontinue the use of the BSWAT and
- (b) Ensure that the Australians Supported Wage System (SWS) is changed to secure the right assessment of the wages of persons in support employment.⁶

In December 2013, Maurice Blackburn initiated a class action for 10,000 people adversely affected by underpayment of wages.⁷

The lead plaintiff is 25 year old Tyson Duval-Comrie, a 25 year old male living with an intellectual disability. Tyson was paid in accordance with the assessment conducted under BSWAT and was paid \$1.77 per hour. Had he been paid lawfully (under the Supported Wage Scheme, which is a productivity component only based tool), he would have received approximately \$3.54 per hour.⁸ By contrast, the award rate for his job at the time was \$15.96 per hour.

On 5 June 2014, the Bills were introduced into the House of Representatives.

THE PAYMENT SCHEME WILL SHORTCHANGE INDIVIDUALS

The introduction of the *Business Services Wage Assessment Tool Payment Scheme* ensures that workers at ADE with intellectual disability will get a raw deal.

This will impact on people living with at least one of the following impairments: intellectual disability, autism spectrum disorder, dementia, acquired brain injury, and any other condition as prescribed by the legislative rules.⁹

The payment scheme will actually shortchange individuals, via stamping out their right to seek compensation, and by offering a reduced amount of reimbursement.

Clause 3 of the Bill provides that:

'The Secretary must determine an application, by making an offer to make a payment to the person (if satisfied the person is eligible for the scheme), or by refusing the application (if satisfied the person is not eligible, or if the payment amount is nil).



If the person accepts the offer:

- (a) the Secretary will make the payment to the person; and
- (b) by force of this Act, the person will cease to have certain legal rights.'

However, if the person does not accept the offer, the Secretary will not make the payment to the person and the legal rights that would cease on acceptance continue unchanged.¹⁰

Rights to compensation at law

Participation within the payment scheme is conditional upon an individual waiving their rights to compensation via the class action.

Clause 9 of the Bill attempts to specifically erode rights existing in an individual being a member of a representative class action.

Clause 9 provides that:

'(1) If:

- (a) a person lodges an effective acceptance and
- (b) immediately before lodging the acceptance, the person was a group member in relation to a relevant representative proceeding; then, at the time the acceptance is lodged and **by force of this section**, the **person ceases to be a group member** in relation to the relevant representative proceeding.

(2) Subsection (1) has effect **despite the provisions of Part IVA of the *Federal Court of Australia Act 1976***. In particular, **a group member does not need to opt out of the proceeding in accordance with section 33J of that Act** in order to cease to be a group member.

(3) For the purposes of section 33F of the *Federal Court of Australia Act 1976*, the lodging of an effective acceptance by a person or the doing of any other act under this Act or the Rules does not constitute the taking of a step in a representative proceeding or conducting part of the proceeding.

(4) Any of the following is a relevant representative proceeding:

- (a) the representative proceeding commenced by originating application in the Federal Court on 20 December 2013 as **proceeding number VID 1367 of 2013**,



- (b) any other representative proceeding in the Federal Court:
 - (i) in which damages or compensation are claimed in connection with the use of a BSWAT assessment to work out a minimum wage payable to a person, or
 - (ii) in relation to which a person may be a group member on the same, or substantially the same, basis as the conditions in section 6;
- (c) any appeal, application for leave to appeal or application for special leave to appeal from any judgment in a proceeding referred to in paragraph (a) or (b),
- (d) any appeal from any judgment in an appeal referred to in paragraph (c).'

Of note, specific reference within Clause 9, Subsection 1 and its superseding the entirety of Part IVA of the *Federal Court of Australia Act 1976* is concerning as it therefore overrides standard procedures and protections in the conduct of representative proceedings that have been in place for almost forty years.

Clause 9 assists the government in avoiding liability in that it makes it as easy as possible for individuals to opt out of proceedings. Clause 9 specifically overrides standard legislative requirements regarding opting out: with acceptance of the offer under the payment scheme an automatic opt out, rather than the Court requiring written notice of a person opting out of the case, given under the rules of Court, as per s33J of the Act.

In particular, the specific reference to the representative proceeding involving 10,000 claimants, with citation of the proceeding number, could be seen as an intentional and wilful attempt to siphon individuals out of the claim.

It appears that the legislative introduction of the payment scheme is exclusively designed to exclude individuals from joining the class action currently underway.

It is questionable whether the creation of the payment scheme would effectively breach the spirit and content of the Commonwealth's own Model Litigant Guidelines.

The Commonwealth's duty to act as a model litigant can be traced back to the decision of *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 at 342. The Guidelines recognise the significant power imbalance between the Commonwealth and an individual with whom it is engaged in litigation.

The Commonwealth (or its agents) cannot be regarded as an ordinary civil litigant.



It is required to act only in the public interest.

The Model Litigant Rules state that the Commonwealth (or its agents) should pay legitimate claims without litigation and that litigation should not be prolonged or generate additional costs by the selection of technical points.

In this situation, the Commonwealth is seeking to defeat the legitimately exercised rights of underpaid workers (who happen to suffer a disability) through the implementation of legislation.

Receiving lower payouts

Individuals will also receive less through signing up to the payment scheme, than they would otherwise receive via a legal settlement.

Clause 8 provides that:

‘(a) the amount a person should receive, [if the person accepts an offer] should broadly reflect **the amount that is 50% of the excess** (if any) **of a productivity-scored wage over an actual wage.**’

Therefore, people will only receive half of the payments that they would have otherwise received had their wages been assessed only on the productivity component of BSWAT.

Given that people have been underpaid on an hourly rate, using this assessment to determine any payments that people are eligible to receive, will significantly cut back total payment amounts.

THE GOVERNMENT’S ARGUMENTS FOR THE SCHEME

The Federal Government has suggested that the implementation of the payment scheme is a necessary move. As cited by the Minister for Social Services in his second reading speech introducing the Bills:

‘The payment scheme will help provide ongoing employment for employees with disability following a recent Court case...

Acknowledging that legal proceedings may take some time to resolve, the government has decided to establish a payment scheme to give reassurance to supported employees, and their families and carers, by removing perceived liability that could impact the ability of Australian Disability Enterprises to deliver ongoing employment support.

... In the longer term, a new wage assessment process will be developed for



use in Australian Disability Enterprises.

However, the Government's immediate priority is to ensure minimal disruption to the employment of supported employees. The payment scheme established by this bill demonstrates our ongoing commitment to improving certainty for those involved.¹¹

'Provide ongoing employment'

One of the key arguments presented for the payment scheme is that Australian Disability Enterprises will otherwise become unsustainable or uncertain, leading to a loss of jobs for people with disability, should the payment scheme fail to be implemented.

However, we note that a movement away from the BSWAT model will not cause rigorous problems. We note that the one year exemption granted by the Australian Human Rights Commission to the Commonwealth was conditional upon the fact that all necessary steps were taken to transition away from the BSWAT to the Supported Wage Scheme. In essence, the movement away from BSWAT is meant to already be in traction.

The joint response of disability peak bodies to the Australian Human Rights Commission regarding the Commonwealth's application for exemption also noted that:

'We estimate that productivity based award wages would increase annual wage cost in ADEs by \$78 million with a return on pension savings to the Commonwealth of \$34 million. It would cost the Commonwealth a maximum of \$44 million to guarantee fair award wages and the current level of jobs.'¹²

Peak disability groups also noted that 53 per cent of ADEs were profitable in 2000, dropping to 44 per cent in 2013, however with an additional 24 per cent borderline profitable.¹³

'Legal proceedings may take some time'

We note that legal proceedings in this area have been fought with considerable ballast by the Commonwealth, including a failed attempt to appeal to the High Court regarding the decision in *Nojin* and an application to the Australian Human Rights Commission for an exemption from paying higher wages to such workers for three years.

The Explanatory Memorandum to the Bills states that 'proceedings could potentially take years to resolve'¹⁴.



However, the fact of the matter is that legal proceedings in this area do not need to take a long period to resolve: the Commonwealth could negotiate with the thousands of workers who have been underpaid and settle the case. Any delay in settlement is potentially dependent upon the Commonwealth, and should not be used as a justification for the introduction of the payment scheme.

Furthermore, we query as to whether future communications between the Government and individuals about the payment scheme may refer to the fact that 'proceedings could take years', as a pressure-building concern which could influence individuals to relinquish their rights to seek adequate compensation.

ACCESS TO LEGAL ADVICE

We also have concerns regarding access to legal advice and the payment scheme.

We note that the Minister cited in his second reading speech that:

'During the acceptance period, the applicant must seek independent financial counselling and legal advice. Access to a legal adviser and a financial counsellor are funded through the scheme, and certificates from the financial counsellor and the legal adviser must accompany the applicant's acceptance of the offer. Payment will be made once a valid acceptance has been lodged by an eligible applicant.'¹⁵

Certification of legal and financial advice is thus required by an individual or their nominee for acceptance of an offer.

However, we question as to whether legal advisers and financial counsellors will receive higher amounts of funds for their services under the payment scheme than the individuals affected.

This is certainly possible, given the paltry sums being offered by the payment scheme.

This would serve to create a bureaucratic scheme in which people being consulted about entry into it would receive more than those whom it was touted to support.

We also question as to what will happen if the legal adviser or financial controller does not recommend acceptance of the offer, and whether the payment scheme will fund this advice. If the scheme will not fund such advice, we question as to whether this creates a conflict of interest wherein the practitioner will only receive



payment if they encourage acceptance of the offer.

Furthermore, the Bills do not provide for a person to seek merits review through the Administrative Appeals Tribunal, with clause 27 instead proposing that the Secretary appoint an external reviewer.

JOINT PARLIAMENTARY COMMITTEE ON HUMAN RIGHTS

We note that the Joint Parliamentary Committee on Human Rights identified their concerns regarding the Bills in their Ninth Report of the 44th Parliament.

The Chair of the Committee, Senator Dean Smith, noted in his tabling statement that:

‘As noted in the report, the Committee has raised concerns about the operation of the scheme from the perspective of the right to an effective remedy, the right to just and favourable conditions of work and the right to equality and non-discrimination, including the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.

The committee has sought the advice of the Minister as to whether the proposed scheme is compatible with these rights, noting that the statement of compatibility did not adequately identify and assess how potential limitations on rights would be reasonable, necessary and proportionate in each case.

I encourage Senators to consult the report for the full discussion of the Bill.’¹⁶

The Report noted that:

‘the principal rights engaged by this Bill are the right to an effective remedy, the right to just and favourable conditions of work and the right to equality and non-discrimination, including the right of persons with disabilities to be recognised as persons before the law and to the equal enjoyment of legal capacity.’¹⁷

The Report noted further that:

‘In light of the Federal Court finding that the application of the BSWAT constituted unlawful discrimination, the release and indemnity provisions; the expressing of offers as payments instead of compensation; and the refusal to make admissions of liability give rise to a concern that the scheme does not contain the requisite elements of an effective remedy to



the unlawful discrimination found to have taken place'.¹⁸

The Report also noted that:

'To the extent that the payments provided for by the scheme would be less than what an affected person would have been entitled to had their wages been assessed by a non-discriminatory method, the Bill may represent a limitation on a person's right to receive fair and just compensation for their work.'¹⁹

While the Committee's report seeks further information from the Minister for Social Services regarding detail within the Bills, we submit that at their core, the Bills deny individuals' access to an appropriate remedy. Clarification of additional detail is not sufficient to rectify the Bill's shortcomings.

THE NATIONAL FOCUS ON DISABILITY INCLUSION

We note that there has been a national push towards greater social inclusion for people with disability, with the national rollout of the National Disability Insurance Scheme (NDIS), which will also provide supports to enable people to participate meaningfully in the community, including supports required that will assist in securing employment.

Individuals who are currently employed by ADE may be able to access the NDIS if they fulfil the appropriate criteria and also live within a launch site.

We note that there has also been a push to reduce the number of people receiving support under the Disability Support Pension and alternative welfare income streams, with a push to 'earn or learn'.

It is incongruous that at the same time, the Commonwealth is failing to adequately backpay workers who have earned wages at a discriminatory rate.

We submit that to legislate to undermine the rights of people with intellectual disability for fair payment for their work is unconscionable.

CONCLUSION

We note that if passed, these Bills will negatively impact on thousands of Australians.

Currently, there are 193 organisations operating Australian Disability Enterprises



across the country, employing 20,000 workers with moderate and severe levels of disability,²⁰ across a range of industries including packaging, manufacturing, catering and horticulture.²¹

Many of these workers have worked in these positions for decades or many years.

Maurice Blackburn estimates that 10,000 workers have been underpaid.²² This appears to accord with the Minister for Social Services' acknowledgement that the BSWAT is 'used to determine the wages of about half of all workers in Australian Disability Enterprises.'²³

The Bills were introduced under the guise of supporting people with disability in Australia.

We submit that the detail contained within these Bills actually robs people living with disability from effectively accessing justice and exercising their legal rights to seek compensation for underpayment of wages.

We submit that the people affected by the proposed legislation are among the most vulnerable of Australian workers.

These workers are participating in society and enjoying their contribution. So too, are the many hundreds of thousands of Australians who benefit as a direct result of these individuals' work.

These Bills both undervalue the contribution of people with intellectual disability to the workforce and undervalue their rights to seek redress when they have been wronged.

No Australian living without disability would be treated in such a manner.

In essence, the payment scheme will provide less compensation to individuals who have been underpaid than they would otherwise receive and attempts to circumvent the Court process via justifying minimal payouts to thousands of intellectually disabled workers.

The true winners will be the Government: who will end up paying less to remedy the many hours of underpayment that workers have suffered; and any legal advisers or financial controllers that may potentially receive far higher payments under the scheme than any of the individuals seeking their advice.

While touted as a scheme that will 'improve certainty' for workers, in reality, this is a wolf dressed in sheep's clothing that will only provide half of what individuals would have otherwise been entitled to.



We submit that the Bills should not be passed, and that it would be more appropriate for the Commonwealth to effectively negotiate for the appropriate compensation of Australian workers who have had their wages underpaid.

We submit that the Commonwealth should take the steps recommended by the Australian Human Rights Commission in April 2014, including taking all necessary steps to transition to the Supported Wage System.

Such a move would be more in keeping with case law and in ensuring fair access to wages for people with disability in Australia.

REFERENCES

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² Australian Human Rights Commission, 'Application for exemption from *Disability Discrimination Act 1992* (Cth) for Business Services Wage Assessment Tool,' Tuesday 29 April 2014. Accessed at <https://www.humanrights.gov.au/news/media-releases/application-exemption-disability-discrimination-act-1992-business-services-wage>

³ Ibid.

⁴ 'Australian Human Rights Commission Supports Continued Discrimination of Employees with Disability,' Joint media statement of National Council on Intellectual Disability; AED Legal Centre; People with Disability Australia; Disability Advocacy Network Australia; Australian Federation of Disability Organisations; Down Syndrome Australia; Family Advocacy; Physical Disability Australia; Side by Side Advocacy, 1 May 2014. Accessed at http://www.downsyndrome.org.au/documents/DSA_Media_Release_1402_HRC_BSWAT.pdf

⁵ Ibid.

⁶ 'A joint response from national peak consumer and advocacy organisations in response to questions from the Australian Human Rights Commission regarding the application by the Department of Social Services for an exemption from the Disability Discrimination Act 1992 to use the Business Services Wage Assessment Tool,' ('A joint response') 31 January 2014 at 6. Accessed at <https://www.humanrights.gov.au/sites/default/files/AHRC%20Reponse%20to%20Issues%20and%20Questions.doc>

⁷ Ibid.

⁸ Clay Lucas, 'Disabled workers go to Federal Court over back pay,' *The Age*, 20 January 2014. Accessed at <http://www.smh.com.au/federal-politics/political-news/disabled-workers-go-to-federal-court-over-back-pay-20140119-312rx.html>



⁹ Clause 7, Business Services Wages Assessment Tool Payment Scheme Bill 2014 (Cth) ('BSWATPS Bill').

¹⁰ Clause 3, BSWATPS Bill.

¹¹ Parliament of Australia, House of Representatives, Hansard, 15 June 2014, Second reading speech, Mr Kevin Andrews MP. Accessed at [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar5269%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards\);rec=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar5269%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards);rec=0)

¹² A joint response, above n 6, at 7.

¹³ Ibid.

¹⁴ Explanatory Memorandum to the BSWATPS Bill at 2.

¹⁵ Parliament of Australia, above n 11.

¹⁶ Parliamentary Joint Committee on Human Rights, Statements by the Chair, Tabling Statement, Ninth Report of the 44th Parliament, 15 July 2014. Accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Statement_S

¹⁷ Parliament of Australia, Joint Standing Committee on Human Rights, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Bills introduced 23 – 26 June 2014, Legislative Instruments received 7 - 20 June 2014 Ninth Report of the 44th Parliament, 15 July 2014 at 2. Accessed at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Completed_inquiries/44th/944/index

¹⁸ Ibid, at 5.

¹⁹ Ibid, at 8.

²⁰ Parliament of Australia, House of Representatives, Hansard, 15 June 2014, Second reading speech, Mr Kevin Andrews MP. Accessed at [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar5269%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20\(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards\);rec=0](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar5269%20Title%3A%22second%20reading%22%20Content%3A%22I%20move%22%7C%22and%20move%22%20Content%3A%22be%20now%20read%20a%20second%20time%22%20(Dataset%3Ahansard%20%7C%20Dataset%3Ahansards);rec=0)

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²² Maurice Blackburn Lawyers, 'Workers with Intellectual Disabilities Class Action'. Accessed at <http://www.mauriceblackburn.com.au/legal-services/general-law/class-actions/current-class-actions/workers-with-intellectual-disabilities-class-action/>

²³ Parliament of Australia, above n 11.